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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE AMERICAN TRADING COMPANY,
Appellee.

Brief for the American Trading Company.

F. B. JENNINGS,
HOWARD VAN SINDEREN,
For Appellee.

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Supreme Court of the United States,

OCTOBER TERM, 1904. No. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE AMERICAN TRADING COMPANY,
Appellee.

BRIEF FOR THE AMERICAN TRADING COMPANY.

Statement.

This is a claim by the American Trading Company against the Receivers of the Northern Pacific Railroad for losses sustained by reason of delay in the transportation of goods to Japan, which the claimant seeks to enforce against the new company through an intervention in the foreclosure suit in pursuance of the provisions of the decree of foreclosure and sale. Under an order of the Court made April 16, 1897, the American Trading Company filed its petition of intervention, and the Northern Pacific Railway Company, the purchaser at the foreclosure sale, subsequently filed its answer thereto. The parties agreed upon a statement of facts and waived a trial by jury by a written stipulation filed April 17, 1901 (pp. 13–29).

The material facts upon which the claim is based, as found by said stipulation, are as follows :

In September, 1894, the Receivers were authorized to continue and were continuing to carry on the business of the railroad in their charge. They had agreements with various connecting carriers by

which through bills of lading were issued to points beyond the lines of the Receivers. Among such carriers was the Northern Pacific Steamship Company, which was an English company, operating a line of steamers between Tacoma and Yokohama (p. 14); but, at the time of the transactions herein referred to, the Trading Company did not know that the Steamship Company was a separate and independent company or that the steamships were not operated by the Receivers (p. 15).

For convenience in transacting their freight business in the eastern part of the United States, the Receivers maintained an office in the City of New York, in charge of George R. Fitch, who was their General Eastern Agent, and made arrangements for the transportation of freight over the Receiver's line of railway and connections, including transportation to China and Japan (p. 15).

The Trading Company, which had its principal office in New York and carried on a general commercial business with Asiatic ports, applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the Trading Company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, which would require its delivery at Yokohama at a fixed date. Fitch, therefore, named a rate, and "*undertook* to forward the lead from New York on or before September 29th, and via Northern Pacific Steamer "Tacoma," sailing from Tacoma October 30th, 1894" (p. 15).

Thereupon the Trading Company cabled to its agents at Yokohama, naming a price and a date at which the lead could be delivered there; and its Yokohama agents made a contract for the sale of the lead, which provided that it should be delivered in Yokohama by overland route and the most direct connection at San Francisco, Tacoma or Vancouver, and that in case of unusual or extraordinary delay in transit, the contract should be null and void (pp. 15, 16). In order to fulfill its Japanese contract the Trading Company thereupon purchased two hundred tons of pig lead in bond for export (p. 15).

Before naming a rate, the General Eastern Agent of the Receivers had expressed some doubt as to whether lead might not be excluded from transportation as contraband, in view of the war then existing between China and Japan (p. 17); but afterwards, on Sep-

tember 19, 1894, he wrote to the Trading Company confirming the proposition which he had already made, including transportation "from Tacoma *via* Northern Pacific Steamer sailing from thence "October 30th," and asking that an acceptance of the proposition be forwarded as early as possible. On the following day (September 20th) the Trading Company accordingly accepted the proposition in writing.

This correspondence is printed in the record, page 16, and ratifies and confirms the contract for the transportation and delivery of the lead, as above stated.

On September 22d the General Eastern Agent of the Receivers wrote to the Trading Company, confirming the routing which he had previously given by telephone and added: "Please advise me as "soon as possible who the shippers will be, that I may order the "cars and also see that same are rushed through without delay, to "connect with *our* steamer at Tacoma" (p. 17).

On September 24th (in pursuance of telegraphic instructions from Baird, the Assistant General Freight Agent of the Receivers, who had previously authorized Fitch to quote the through rate to Yokohama, Fitch informed ~~the General Eastern Agent of the Receivers~~ the Trading Company that he declined to ship the lead upon the ground that it might be contraband of war (p. 18).

In fact, the shipment of pig lead was not prohibited by the Treasury Department at Washington during the war between China and Japan, and on September 25th, the Trading Company made another shipment of pig lead *via* Pacific Mail Steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama (p. 17).

The Trading Company immediately notified Fitch in writing that it would hold the railroad company responsible for any loss that it might sustain from a failure to fulfill the contract (p. 18). Fitch then telegraphed both to Baird and Hannaford (who was the General Freight Agent of the Receivers) that the shippers refused to accept withdrawal, and added: "We have given shippers written con- "tract;" and again: "They state they will hold us to contract;" and asked for prompt advice. Baird then wired to take the lead (p. 19). Thereupon the refusal to accept the shipment was withdrawn, and "*the shipment was made under the contract*" (p. 19) on September 27th at Newark, New Jersey, pursuant to the shipping instructions theretofore given by the General Eastern Agent of the Receivers; *and* "*on the afternoon of September 27, 1894, the shipment*

left Newark, and started on its journey" (p. 19). The shipment was made in bond for exportation from Tacoma, and was secured upon the cars by Government locks and customs seals. This was the first shipment ever made by the Trading Co. over the Northern Pacific lines (p. 19).

On September 28th the Trading Company paid the freight charges from Newark to Yokohama, by check drawn to the order of the Northern Pacific Railroad, which was deposited in bank to the credit of the account of George R. Fitch, General Eastern Agent of the Northern Pacific Railroad, and the proceeds were subsequently remitted to the Receivers (p. 20). On September 28th a shipping receipt was issued to the Balbeck Smelting and Refining Company (from which the Trading Company had bought the lead), and was delivered by the Balbeck Co. to the Trading Company, and by the Trading Company was forthwith surrendered to the General Eastern Agent of the Receivers. A bill of lading in the usual printed form was subsequently issued and received by a clerk of the Trading Company, without stated objection to its terms, *but was not read or examined by him or by any officer of the Trading Company*, and was immediately hypothecated with the Hong Kong and Shanghai Bank as collateral security for money borrowed by the Trading Company (pp. 20-21).

At Tacoma the lead was loaded on board the steamship "Tacoma," which was to sail on October 30th, but, about four o'clock on the afternoon of that day, the Deputy Collector of the United States refused to clear the vessel with the lead on board, upon the ground that it was contraband of war, and telegraphed to the Collector at Port Townsend for instructions (p. 22).

On the following day, October 31, the Deputy Collector at Tacoma received a telegram from the Collector at Port Townsend, stating that, unless he had evidence tending to show that the lead was to be used in the war between China and Japan, no reason was perceived why the shipment should not be permitted (p. 22).

In the meantime, however, the lead was unloaded, which delayed the ship until nine o'clock on the morning of October 31st, when it sailed without it (p. 22).

The Trading Company was not informed of this until November 5th, 1894 (p. 22).

The lead finally went forward on December 11th, 1894, and arrived at Yokohama on January 4, 1895, instead of on or about

November 18th, 1894, when it would have arrived had it been transported by the steamship "Tacoma," sailing October 31st (p. 22).

In the interval, hostilities between China and Japan had ceased, the price of lead had fallen very considerably; the purchaser of the lead in Japan refused to accept it, and declared the Japanese contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract; and, as soon as a purchaser could be found, the Trading Company sold the lead for the best price obtainable, which was $27,278.57 less than the contract price (p. 22).

Upon the foregoing facts the Trading Company duly presented to the Receivers, and also to the Northern Pacific Railway Company, its claim for $26,704.02 (which was the difference between the contract price and the market price of the lead in Japan on January 4th, 1895, when it arrived), with interest from that date. Payment was duly demanded, but was refused; and no part of the claim has been paid (p. 22).

The Circuit Court dismissed the petition on the ground that the Receivers were excused by the act of the Deputy Collector, as stated in the opinion printed at page 29 of the Record. The Circuit Court of Appeals reversed the decree of the Court below and directed the payment to the intervenor of the amount of the claim. The opinion will be found at page 40 of the Record.

POINTS AND ARGUMENT.

I.

The contract made by the Receivers, by their agent, was for through transportation to Yokohama, and contained an absolute agreement to ship from Tacoma by steamer to sail on or about October 30, 1894.

1. This is expressly found by the stipulation itself which states (Third Finding, p. 14) that "for convenience in transacting their freight business in the Eastern part of the United States the Receivers maintained an office in the City of New York which was in September, 1894, in charge of one George R. Fitch, who was their General Eastern Agent and made arrangements for the transportation of freight over the Receivers' line of railway and connections, including transportation to China and Japan;" and (Fifth Finding, p. 15) that "in September, 1894, the Trading Company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay in order to enable the Trading Company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan and which would require its delivery there at a fixed date. Fitch thereupon named a rate and *undertook* to forward the lead from New York on or before September 29th and via the Northern Pacific steamer 'Tacoma' sailing from Tacoma October 30, 1894;" and (Tenth Finding p. 19) "thereupon * * * *the shipment was made under the contract* and the lead, consisting of 200 tons was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, September 27, 1894."

On September 27th, when the lead was shipped at Newark and started on its journey the bill of lading had not been issued (p. 20) and the finding that "the shipment was made under the contract" is conclusive that the shipment was made under the contract previously made, as found by the stipulation and confirmed by the correspondence between the parties (p. 16).

2. The contract in question was also confirmed by the letters between the parties which are set out in full in the Tenth Finding (p. 16). The letter of September 19th, confirming the undertaking previously made, and the reply of September 20th, constituted a complete ratification and adoption in writing of the contract previously made orally for the transportation and delivery of the lead as therein stated.

3. That this contract was absolute and unconditional and that it was intended to guarantee the through transportation of the shipment to Yokohoma by steamer sailing from Tacoma on October 30, 1894, appears not only upon the face of the correspondence and of the stipulation, but also from the circumstances under which the contract and shipment were made. In applying to Fitch for a rate the Trading Company informed him of the vital importance of prompt delivery to enable it to fulfill its proposed agreement for the sale of the lead in Japan. Fitch understood this and understood that he was assuming the risk, for it appears (Eighth Finding, p. 17) that before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband in view of the war then existing between China and Japan; and, as appears from the seventh allegation of the petition, not denied by the answer (p. 3), he communicated with the Treasury Department at Washington and "ascertained that the lead would be allowed to go forward and would not be stopped as contraband, and thereupon entered into the contract to ship the said lead." In reliance upon this undertaking the Trading Company then closed its contract in Japan for the sale of the lead requiring its delivery there without delay (Sixth Finding, p. 15), and Fitch and the Receivers seem to have been informed of this fact on September 24th (p. 16).

4. This was also shown by the correspondence with Hannaford and Baird, and also by the letter subsequently written to the agents of the Steamship Company by Fitch, as General Eastern Agent of the Receivers, in which he said, "*I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. 'Tacoma,' sailing Oct. 30th.* Will you kindly see that this connection is made without fail?"

5. The theory advanced by the appellant, that in contracting for transportation beyond Tacoma Fitch acted as agent for the Northern

Pacific Steamship Company and that knowledge of the fact must be imputed to the Trading Company, is untenable.

This was the first shipment ever made by the Trading Company over the lines of the Northern Pacific Railroad and its connecting carriers (p. 19). The Trading Company did not know the Steamship Company in connection with the transaction at all, nor indeed that there was any such company, nor that that company owned or had any relation to the steamer "Tacoma." Their entire dealings were with Fitch as the agent of the Northern Pacific R. R. Co. and its Receivers. His letters to them were written upon paper bearing the letter-head of the Receivers, and were signed by him as such General Eastern Agent, and their letters to him were addressed to him in the same capacity.

There is not a word anywhere in the stipulated findings of fact to suggest that the Trading Company ever knew or had any reason to know that Fitch was acting in any other capacity. The officers of the Trading Company were led to believe, and did in fact believe, that the "Northern Pacific Steamer" "Tacoma," referred to in Fitch's contract, was owned by the Northern Pacific R. R. Co. and operated by the Receivers. The correspondence shows they were justified in so believing. Now it appears that by the terms of the traffic agreement between the Railroad Company and the Steamship Company *the two companies were jointly interested in the through traffic*, and the latter company authorized the Railroad Company and its appointed agents to act as agents for the Steamship Company and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for Asiatic ports (Exhibit A, p. 23). But the Trading Company did not know that there was any such agreement (p. 15), or that the Steamship Company was a separate and independent company, and Fitch himself had no direct or independent appointment or authority from the Steamship Company and no authority as its agent except such as may have been created by that agreement, and he knew no more about it than "that an arrangement had been concluded by the Receivers and the Steamship Company by which contracts for through shipment to Yokohama might be made by the agents of the Receivers" (p. 15). All his dealings with the Trading Company were in his capacity as agent of the railroad or its Receivers. He did not himself know that he could act in any other capacity. If he acted as agent of the Steamship Company he evidently did it without knowing it. The Receivers made and collected through rates on shipments to China

and Japan, and the only instructions Fitch received came from them. When Fitch notified the Steamship Company of freight engagements, which he appears to have done occasionally as a matter of favor or precaution, but evidently not in the discharge of any duty to the Steamship Company, he gave the notice in his capacity as General Eastern Agent of the Railroad Company; and in the communications which Fitch received from the agents of the Steamship Company at Tacoma he was addressed as General Eastern Agent, Northern Pacific Railroad (p. 21).

6. The contract was also expressly ratified by the Receivers.

On September 24th, under instructions from Baird, the Assistant-General Freight Agent of the Receivers at their head office in St. Paul (p. 18), Fitch informed the Trading Company that he declined to ship the lead, upon the ground that it might be contraband of war. Obviously Fitch's refusal was based upon the possibility of interference with the shipment after it reached Tacoma, showing clearly his consciousness that the obligation of his contract extended beyond Tacoma. The Trading Company notified Fitch at once that it would hold the Railroad Company liable in damages for the threatened breach of contract (p. 18). Fitch thereupon on September 24th informed Baird that he had already given the Trading Company a written contract, and that it would hold them to the contract (p. 19). Thereupon, with the approval of Baird, the refusal to accept the shipment was withdrawn; the shipment was made under the contract, and the Trading Company paid to the Receivers the through freight on the shipment from New York to Yokohama (p. 20). This confirmation, and indeed all of the telegrams in connection with this shipment included in the stipulation (p. 18), show clearly that the shipment was originally authorized by the Receivers, and was expressly ratified by them.

It seems perfectly clear then from the stipulation, from the correspondence with Fitch, from the correspondence between Fitch and his principals and from all the circumstances in the case, that both the Trading Company and Fitch and also his principals understood that the contract in question was made by Fitch for the Receivers and was for through transportation to Yokohoma via the steamer to sail on or about October 30, 1894, and brings the case clearly within the well-established doctrine that a carrier may by special contract bind himself to deliver beyond the terminus of his particular route.

II.

The Receivers had power to make the contract.

By the order appointing them the Receivers were authorized to continue the operation of the railroad and to exercise its authority and franchises and to conduct the business and occupation of a common carrier of passengers and freight and to manage the property at their discretion and in such manner as would in their judgment produce the most satisfactory results consistent with the discharge of the public duties imposed upon them, as appears from the order appointing the Receivers on file in the Circuit Court.

That a common carrier has power to contract for transportation beyond the terminus of its line, even though such carriage extend into another state or country, is well settled.

Elliott on Railroads, § 1434 and cases cited.

> " If the carrier, or his servant within the scope of his " employment and duty, enter into any special contract to " deliver at any particular time or place, even beyond the " terminus of his particular route, it will be binding, and the " owner, it would seem, may recover damages with reference " to expected profits had the goods been delivered in time."
>
> *Redfield on Railways, Secs. 189, 191, and cases cited.*
> *Hutchinson on Carriers, § 151, 152.*
> *Ogdensburg, &c., R. R. Co. vs. Pratt, 22 Wall., 123.*
> *R. R. Co. vs. McCarthy, 96 U. S., 258.*

With respect to such contracts and transportation, the Receivers were liable to third parties in all respects to the same extent as the Railroad Company would have been liable by law.

In *Beers vs. The Wabash, St. L. & P. Ry. Co., 34 Fed Rep., 247,* Judge GRESHAM said :

> " Although the property of the Wabash Company is in " custody of the Court it is operated by the Receiver as a " common carrier. His rights and duties are those of a com- " mon carrier."

In *Elliott on Railroads,* the author says :

> § *567.* A Receiver " may contract to carry freight at a spec- " ified rate, even beyond the terminus of his road, to points on

" a connecting road, and an order of the Court is not necessary " to authorize him to do so " § 576. " It accords with sound " principle and reason that a receiver exercising the fran- " chises of a railroad company shall be held amenable in his " official capacity to substantially the same rules of liability " that are applicable to the company while it exercises the " same powers of operating the railroad. And this is the " rule established by the great weight of modern author- " ity. * * * The cases are practically unanimous in hold- " ing that a receiver that assumes to exercise the rights and " a powers of common carrier becomes answerable in his " official capacity for all injuries and losses sustained by per- " sons dealing with him in that capacity to the same extent " in general that the corporation would have been liable."

Hutchinson on Carriers, § 67a.

Beach on Receivers, § 371.

Central Trust Co. vs. N. Y. City & Northern. R. R., 110 N. Y., 257.

Little, Recr., vs. Dusenberry, Adm., 46 N. J. Law Reps., 614.

Wall vs. Platt, 169 Mass., 400.

In *Kansas Pacific Ry. Co. vs. Bayles (Supreme Court, Colo.), 35 Pac. Rep., 744,* it was expressly held that Receivers have such power, and the Court said:

" The agreement being to carry goods from New York, " Chicago and St. Louis to Denver while the appellant's " road did not extend east of Kansas City, it is urged that " the making of the contract was beyond the power of the " receivers. We do not think this contention is well " founded. The receivers, subject to the orders of the court " from whom their authority emanated had full power to " conduct the business of the corporation according to ap- " proved methods of operating such enterprises; and no " reason is perceived why such officers should not be per- " mitted to make contracts for the carriage of freight and " passengers beyond the limits of the road immediately under " their control. Such contracts are usual, and perhaps neces- " sary, in many instances, to the successful operation of the " business of common carriers, and are also a great public " convenience."

The language quoted by the appellant from *Chicago Deposit Vault Co. vs. McNulta, 153 U. S., 554,* was used with reference to a long lease made by Receivers, involving a large annual expenditure and related to the rent subsequent to the termination of the receivership. But the question in this case re-

lates to the ordinary and usual administration of the property and the authority of the Receivers to carry on the operation of the property and the business of the company necessarily empowers them to make such contracts with reference to the transportation of passengers or freight as the company might have made. If the duty were cast upon shippers of seeing to it that Receivers do not exceed their authority in such respects, it would be impossible for Receivers successfully to carry on business.

In this case the Receivers had sufficient power and authority to solicit and accept from the petitioner the shipment in question which the shipper might have sent by another line without any trouble or delay (as it did another shipment at about the same time) (p. 17); they had sufficient power and authority to retain and confirm the arrangement for the shipment when, upon their proposal to withdraw, the Trading Company expected to ship via San Francisco (p. 19); they had sufficient power and authority to obtain and accept from the petitioner the sum of $3,360.05 in payment of the full freight from Newark to Yokohama (p. 20), and they cannot now repudiate the transaction and say that, although they had sufficient power and authority to get for themselves the benefits of this contract, they were not authorized to assume the burdens.

III.

The contract was within the scope of Fitch's authority, as General Eastern Agent of the Receivers, and it was also adopted and expressly ratified by them.

"For convenience in transacting their freight business in the "Eastern part of the United States, the Receivers maintained an "office in the City of New York, which was in charge of one George "R. Fitch, who was their General Eastern Agent, and made ar-"rangements for the transportation of freight over the Receivers' "line of railway and connections, including transportation to China "and Japan" (p. 14).

1. The real authority of an agent is equal to his apparent authority, and he can make any contract relative to the business under his management which could be made by his principal.

"The powers of the agent are *prima facie* coextensive "with the business intrusted to his care, and will not be "narrowed by limitations not communicated to the person "with whom he deals."

Insurance Co. vs. Wilkinson, 13 Wall., 222, 235.

In *Goldwater vs. Liverpool, &c., Co., 39 Hun, 178 (affirmed 109 N. Y., 618)*, the Court said:

"Whatever the company can lawfully do itself through "the agency of its executive officers at its home office, can "in general be done by the agent who represents it in the "place where the contract was made relative to the business "of which he is the superintendent."

Pechner vs. Phoenix Ins. Co., 65 N. Y., 195.
Lowenstein vs. Lombard, Ayres & Co., 164 N. Y., 324.

"The authority of an agent may be implied in many "cases from his official designation, the position in which "he is placed and the duties which naturally appertain "thereto. Parties may deal with the agents of corporations "upon the presumption that they possess the powers "usually assigned to the offices they hold, and the principal "is bound as to third persons acting in good faith by the "act of an agent within his apparent authority, although "in the particular instance it was unauthorized."

Isaacson vs. N. Y. C. & H. R. R. R. Co., 94 N. Y., 278, 285.
Talcott vs. Wabash R. R. Co., 159 N. Y., 461, 469.
Porter on Bills of Lading, Sec. 159.
Hutchinson on Carriers, Sec. 267.

A general freight agent has authority to contract for the carriage of goods beyond the limit of the carriers line.

Ray on Negligence of Imposed Duties, p. 400.
White vs. M. P. R. Co., 19 Mo., App, 400.
Grover & Baker Sewing Mach. Co. vs. Mo. Pac. R. R. Co., 70 Mo., 672.

The agent of a railroad has power to stipulate for carriage within a specified time.

Strohm vs. Detroit, &c., R. R., 23 Wis., 126.

Fitch had authority to bind his principals to forward the goods per steamship "Tacoma," sailing October 30th.

Goddard vs. Mallory, 52 Barb., 87.
Goodrich vs. Thompson, 44 N. Y., 324.

It appears clearly from the facts in the case that Fitch was the General Agent of the Railroad Company and the Receivers in the East. He was in charge in their office in New York, maintained for the transaction of their freight business. He was authorized to make arrangements for the transportation of freight over their lines of railway and connections, including transportation to China and Japan. All of his correspondence in connection with such freights, both with the officers of the Receivers at St. Paul and also with shippers, and also with the agents of the Steamship Company, appears to have been conducted by him in his capacity as such General Eastern Agent. All of his transactions in soliciting and arranging for freight appear to have been carried on by him in the same capacity. He was authorized to collect the freight money, and he deposited it in an account which he had opened in a bank in New York as such General Eastern Agent, and all freights so received and deposited by him were remitted by him to the Railroad Company or its Receivers.

While it is found by the stipulation that Fitch had no express general authority to make contracts for through transportation, except as provided by the bills of lading, "and no express authority to make the contract in question, unless such express authority be found in the telegrams," of which copies are set forth in the stipulation, it is likewise found that the American Trading Company did not know the terms of his express authority. But it is entirely unnecessary that he should have had any such *express* authority, because his appointment to act as the General Eastern Agent of the Receivers and to make arrangements for the transportion of freight over the Receivers' line of railway and connections, including transportation to China and Japan, and his course of dealing under it, as shown by the stipulation, were sufficient to raise an implied authority, so far as innocent shippers are concerned, to do anything which the Receivers themselves might have done in reference to such freight.

It is evident that Fitch exercised, and in performing his duties had to exercise, large discretionary powers and that he did so with the consent of the Receivers (p. 19). He determined the routing of

through shipments to Yokohama, that is to say, the lines over which through shipments went forward (p. 19, p. 16). His appointment as the General Eastern Agent of the Northern Pacific Railroad antedated the appointment of the Receivers themselves (p. 20). They continued him in office, and there is not a particle of evidence, and it is inherently improbable that they interfered with the established course of business in the East.

Clearly Fitch's relation to the business was such that he had authority to make any shipping contract which could have been made by the Receivers themselves.

2. Moreover, the receivers expressly authorized Fitch to accept the shipment for transportation to Yokohama (pp. 18, 19). Afterwards on September 22d they notified Fitch to cancel his quotation. On September 24th he replied: "Shipment lead to Yokohama is now "being made. Shippers refuse to accept withdrawal. We have "given shippers written contract" and also: "Have notified Amer- "ican Trading Company that shipment will be refused. They state "they will hold us to contract. They are shipping hundred tons "from Denver to Yokohama by steamer 'City of Rio' from San "Francisco October 4th, and expect to forward this shipment same "way. Will charge us difference in rate. Advise quick." Upon this, a telegram was sent to Fitch from the general office of the Receivers at St. Paul, authorizing him to accept the lead (p. 19). This interchange of messages between Fitch and the general office of the Receivers at St. Paul was not known to the Trading Company (p. 19): but the telegrams disclose important evidence of the direct responsibility of the Receivers for the contract in question, and of their negligence in failing to procure the due performance of it.

The telegrams show that the Receivers knew that, by a special contract *which was not the bill of lading*, their general Eastern agent had undertaken to provide through transportation to Yokohama. They knew the "written contract" referred to by Fitch (p. 19) was not the bill of lading, because the suggestion contained in the message "Think we should receipt for lead subject to delay," could only refer to a shipping receipt or bill of lading, which they knew therefore, or at least assumed, had not been issued, and, indeed, it was apparent from the messages that the lead had not then been shipped nor the bill of lading issued.

The Receivers had been advised by the refusal of the steamship company to handle lead for Yokohama, Kobe, Hong Kong and

Shanghai, that it might be excluded from transportation upon the ground that it was contraband, in view of the war which was then pending between China and Japan. The refusal could have been based upon no other ground. Fitch so understood it; and upon the receipt of the request from the Receivers, "Please cancel your quotation," he informed the Trading Company at once that he declined to ship the lead upon the ground that it might be contraband of war (p. 18).

The Receivers knew that the contract provided for exportation per steamship "Tacoma," sailing from Tacoma, October 30, 1894. On September 25th, which was two days before the lead was loaded upon the cars at Newark, they had telegraphed to Fitch for quick advice as to how the lead was to be forwarded (p. 19); and it is not likely that the request was denied, although, unfortunately, it has not been possible to produce the despatch by which the information was conveyed.

The Receivers, therefore, were informed that a special written contract for the transportation had been made, and were also informed of the obligations which it created, or, if not fully informed as to all the details, they had full opportunity to inform themselves, and it was their duty to do so. Nevertheless, they expressly authorized their agent to accept a shipment of the lead under the special contract, merely suggesting that it should be receipted for, subject to delay. They cannot now repudiate it.

The words, "Think we should receipt for lead subject to delay," used in a telegram, where short forms are the rule, are full of significance. They indicate very clearly that the Receivers supposed *they* were incurring liability for delay, although the delay which they contemplated was that which would occur at Tacoma if the transshipment of the lead should be prevented upon the ground that it was contraband of war. Nevertheless, the despatch was not mandatory; and it is fair to assume that, having authorized the acceptance of the shipment under the contract, the Receivers intentionally refrained from creating a condition which would have been inconsistent with the contract.

Fitch clearly had full authority, both by implication by reason of his appointment as General Eastern Agent and the established course of business, and also by express ratification by the Receivers, to represent and bind them in making the contract in question.

IV,

The contract was not merged in or modified by the bill of lading.

Before the bill of lading was issued the previous contract for transportation had been made and confirmed in writing, the freight for the entire transportation had been paid to the Receivers, the lead had passed from the control of the claimant, had been locked in the cars under Government seals in bond, and had started on its journey across the continent (Finding 10, pp. 19, 20).

And relying upon this contract to transport the lead to Yokohama by steamer to sail from Tacoma on October 30th, the Trading Company had made an absolute engagement to deliver the lead in Japan at a fixed date, and had purchased and shipped the lead to enable it to fulfill that obligation (pp. 15–16). Thus, before the bill of lading was issued, the Trading Company had incurred a heavy liability on the faith of its contract rights.

The rights of the claimant thus had become fixed, and it could not be deprived of those rights, except upon adequate consideration and with its consent.

The consent of both parties was just as essential to the annulment or modification of the contract as to its inception.

Wheeler vs. New Brunswick, &c., R. R. Co., 115 U. S., 34.

1. The Receivers claim that the subsequent receipt of the bill of lading by the claimant constituted such an assent.

But it is well settled that assent to the modification of a shipping contract, under which goods have gone forward, will never be implied from the subsequent receipt of a bill of lading without stated objection to its terms.

In Bostwick vs. Baltimore & Ohio R. R. Co., 45 N. Y., 712, an oral agreement was made by the plaintiff with the agent for a line of railroads, of which that of the defendant formed a part, for the transportation of cotton from Cincinnati to New York by all rail, and the plaintiff had agreed to pay the all-rail rate in New York. After making this contract the plaintiff delivered the cotton at the depot and took depot receipts, and sent the receipts to the office of the agent, to obtain bills of lading. The agent did not deliver any bill of lading at the time, but one or two days afterwards, sent a

bill of lading to the plaintiff's office. The goods had then been shipped. A loss having occurred, the defendant claimed exemption from liability by reason of certain printed conditions contained in the bill of lading.

The Court said (p. 716):

> "The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this. If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped."

In *Missouri Pacific Ry. Co. vs. Beeson, 30 Kan., 298*, the plaintiff in error was a common carrier from a point in Kansas to a point in Missouri and had entered into a parol contract with the defendant in error to carry goods from Paola, Kansas, to Philadelphia, Pennsylvania. Under this contract, the defendant in error delivered certain wool to the plaintiff in error for transportation. After the wool was all delivered and put into the cars and the cars locked, the agents of the railway company handed to the defendant in error bills of lading, which showed that the wool was to be carried from Paola, Kansas, to St. Louis station. The defendant in error did not read the bills of lading, but glanced at them to see that the number of sacks of wool and the weight were correct, and that the consignees were named in the bill. The defendant in error believed that the wool was to be carried to Philadelphia, and did not know that the bill of lading indicated anything else. The Court said:

> "There is nothing in the record to show that the plaintiff [below] acquiesced in that portion of the bills of lading which stated that the wool was to be carried to the St. Louis station, except that the plaintiff received the bills and made no objection; but, as he stated in his testimony at the trial, he did not read the bills, and did not know that they apparently changed the contract between the parties."

The Court held that the defendant in error was entitled to recover on the parol contract, citing *Railroad Co. vs. Manufacturing Co., 83 U. S., 319*, and added:

> "A bill of lading signed by one party only, read by one party only, and understood by one party only, can hardly

" be held to overturn and destroy a previous contract entered
" into by and between both parties, when the original con-
" tract has been principally executed and fulfilled on the
" part of one of the parties, and by that one who did not
" understand the contents of the bill of lading, and who is to
" suffer if the original contract is to be considered as over-
" turned and destroyed. After the wool was loaded upon
" and within the cars, and the cars were locked, it was hardly
" the proper time for the defendant (plaintiff in error) to
" change the original contract."

Swift vs. The Pacific Mail S. S. Co., 106 N. Y., 206.
Mobile & Montgomery R. R. Co. vs. Jurey, 111 U. S., 584.
Park vs. Preston, 108 N. Y., 434.
Gillaume vs. Gen. Transptn. Co., 100 N. Y., 491.
Strohm vs. Detroit and Milwaukee Ry. Co., 21 Wis., 545.
King vs. Woodbridge, 34 Vermont, 565.
Hutchinson on Carriers, Secs. 246, 247.
McAbsher vs. R. R. Co., 12 S. E. Rep., 892.
Hamilton vs. R. R. Co., 96 N. C., 398.
Central R. R. Co. vs. Dwight Mfg Co., 75 Ga., 609.
Baker vs. Mich. S., &c., R. R. Co., 42 Ill., 73.
Merchants Dispatch Tr. Co. vs. Furthmann, 149 Ill., 66.

As was said by Mr. Justice Davis in *R. R. Co. vs. Mfg. Co., 83 U. S. (16 Wall.), 318, 329.*

" If the parties were on an equality in their dealings with
" each other, there might be some show of reason for assum-
" ing acquiescence from silence; but, in the nature of the
" case, such equality does not exist, and, therefore, every in-
" tendment should be made in favor of the shipper, when he
" takes a receipt for his property with restrictive conditions
" annexed and says nothing, that he intends to rely upon the
" law for the security of his rights."

The bill of lading was issued and accepted merely as a receipt for the goods and as evidence of title to them (*Pollard vs. Vinton, 105 U. S., p. 8*).

That it was so intended and understood and was not regarded by either party as a merger, or modification of the existing contract, is clear. The necessary basis and condition of the whole transaction at the outset was clearly understood to be the prompt delivery in Japan.

The Trading Company certainly never intended to assent to any modification or waiver of that condition, for, in reliance upon it, they had already bound themselves by their contract in Japan; and it is

inconceivable that they would consciously assent to any change which would impose upon them the risk of delay which would cause not only a loss upon the goods, but a possible liability to their purchaser for large damages as well, a risk which they had no power to protect themselves against and which had been assumed by the Receivers. And, indeed, it expressly appears that the Bill of Lading was never read or examined by the clerk who received it nor by any officer of the Trading Company (p. 21).

That the agent of the Receivers never understood or intended that there should be any change in that condition is equally certain. He understood the vital importance of prompt delivery and that the Trading Company relied upon the Receivers to secure it. When Baird instructed him to withdraw his quotation he replied on September 24th, several days before the bill of lading was issued, that he had already given the shippers a written contract, upon which they would hold the Receivers liable (p. 19). *And even the day after the bill of lading had been issued, Fitch expressly declared in writing "I have made a contract guaranteeing delivery of this shipment at Yokohama, by our S. S. Tacoma sailing October 30th"* (p. 21).

2. The subsequent dealings of the Trading Company with the bill of lading do not constitute an acceptance of its terms.

As we have already seen the Trading Company received the bill of lading but did not examine it or know its terms or discover that it in any wise differed from the contract already made upon which the Trading Company relied. Nor did the Trading Company receive or accept the bill of lading as a contract or as in any way modifying the contract previously made. The bill of lading was received as evidence of the Trading Company's title to the lead in question and was at once transferred by it without examination to the Hong Kong and Shanghai Bank as security for a loan. The bill of lading was transferred merely as a substitute for the lead itself and for the purpose of passing title to it.

While a bill of lading represents the title to the goods, and also contains stipulations which may create a contract between the parties, it is apparent that in this instance it operated merely as a receipt for the goods and as evidence of title to them, inasmuch as the contract for transportation had already been made in writing and it was not intended in any way to vary or change it. Such being the case, the mere transfer of the bill of lading to the Bank

as security for a loan does not indicate or imply any intention on the part of the shipper to assent to the terms of transportation stated in the bill of lading or to any modification of the contract already in existence. On the contrary the fact that immediately upon its receipt the bill of lading was so transferred to the Bank only strengthens and confirms the conclusion to be drawn from the finding that the Trading Company did not examine the bill of lading or become acquainted with its terms.

It is equally clear that the dealings between the Trading Company and the Bank in respect to the bill of lading could not affect the relations between the Trading Company and the carrier. As pointed out in the opinion of the Court below these dealings were *res inter alios acta.*

The question is one of intention, *i. e.*, whether the Trading Company intended by this bill of lading to modify the terms of the contract previously made. We have already seen that they did not, and clearly the fact of their transfer of the bill of lading to the Bank does not indicate any such intention any more than the receipt of the bill of lading from the carrier.

It is quite clear that the Trading Company's dealings with the Bank could not affect the carrier's obligation to the Trading Company.

Gaines vs. Union Trans. & Ins. Co., 28 Ohio St., 418.

The cases of *The Hyde, 82 Fed. Rep., 681,* and *Rubens vs. Ludgate Hill S. S. Co., 20 N. Y. Supp., 481,* cited for the Receivers, have no application, for in both of those cases the bill of lading constituted the agreement and there was no previous agreement. In the case of the *Ludgate Hill,* that was expressly admitted (20 N. Y. Supp., 484). In the *Hyde* case the Court expressly says that it is the acceptance of the bill of lading "at the time of the delivery of the goods for shipment which binds the shipper."

V.

The failure to perform the contract was not excused by the unlawful refusal of the Deputy Collector at Tacoma to clear the ship with the lead on board.

His refusal did not make the exportation of the lead either illegal or impossible, and if it had done so that would not relieve the Receivers from liability.

The Deputy Collector's act in refusing clearance is conceded to have been unlawful, and, clearly, it was so.

Record, Finding Eighth, p. 17.
Treasury Decisions, August, 1865–1883.
Hendricks vs. Gonzales, 67 Fed. Rep., 351.

1. The Receivers, however, claim that even though the collector's act was not lawful, it, nevertheless, made performance illegal and therefore excused the failure. And, in support of this claim, they cite certain statements contained in some English cases to the effect that where the performance of a covenant has been rendered unlawful by an Act of Parliament the courts will not enforce the contract.

(a) In Great Britain, Parliament is supreme, and it might well be that a different rule would prevail there than in this country where the powers of Congress are subject to constitutional limitations to be construed by the courts. No case can be found in the United States in which it has been held that illegality subsequently arising could affect the validity of a contract previously entered into and lawful when made. And it is, of course, well-settled that no law could be passed by Congress or by any Legislature impairing the obligation of any contract previously made. So that it must be evident that the doctrine suggested by the appellant, as laid down in some of the English cases, can have no application in this country. In other words, that there can be no such thing as illegality subsequently arising which could take the case out of the operation of the rule as laid down in respect to impossibility of performance subsequently arising. And in line with this view it was said in the case of *Davis vs. Wallace, 3 Clifford, 123–131,* "where the contract is that the ship shall be unladen within a certain number of days, it is no de-

fense to an action for demurrage that the over-delay was occasioned by the crowded state of the docks, or by port regulations or Government restraints." Even in England the cases are not harmonious. Brasoa v. Knox, 3 Mod

(b) But the doctrine cited from the English cases does not hold that performance will be excused when prevented by an *unlawful* act but only when prevented by law, and the complete answer to the suggestion of the Receivers is that the performance of this contract did not become illegal in consequence of the unlawful interference by the Collector, and that even under the English law it is well settled that, under such circumstances, the carrier would not be excused, but would be liable to the shipper, and would then have his action for damages against the official who unlawfully and improperly interfered.

Gosling vs. Higgins, 1 Campbell, 451, is directly in point. It was an action for the non-delivery of ten pipes of wine shipped at the Island of Madeira, on board a vessel of which the defendant was owner, to be carried to Jamaica and from thence to England. When the vessel arrived off Jamaica, she was seized with her cargo for a supposed violation of the revenue laws, and there condemned; but upon an appeal to the Privy Council in England, the sentence of condemnation was reversed. In an action by the shipper to recover from the owner of the vessel for the value of the goods, for failure to deliver to the consignees, the defendant claimed that inasmuch as the goods could not be delivered by reason of an act of Government, the defendant could not be held liable. But Lord ELLENBOROUGH, who gave the opinion in Barker vs. Hodgson, quoted by the appellant, decided that the plaintiff was entitled to recover and said: "You have an action against the officers. The shipper can only look to the owner or the master of the ship."

Evans vs. Hutton, 12 L. J. C. P., N. S., 17:

This was an action by the shipper against the shipowner for not delivering cargo at Canton to the consignees, British subjects, pursuant to charter party. The defense was that, "after the ship with the goods on board had arrived near the port of Canton, certain persons then there, being officers of the Queen, duly authorized in that behalf and then exercising the powers of Her Majesty's Government, prevented the defendants from delivering the goods at Canton" and that hence the defendant was excused. On special demurrer the plea was held bad, the Court, TINDAL, C. J., holding

that although the plea stated that the officers in question were duly authorized and exercising the powers of Her Majesty's Government, still it must go further and show that the power so exercised was lawfully authorized by Act of Parliament, and the Court said:

> "It is, however, clear that the pleas intend to set up a dissolution of the contract in consequence of the acts of these officers of Government. We must, therefore, see whether under the Act of Parliament the superintendent has any power such as it is stated in the plea he exercised."

In the case at bar the Collector instead of being authorized by Act of Congress to refuse clearance as he did, was expressly required by that Act to grant it.

It seems clear then that, even under the English authorities, the performance of the contract in this case would not be excused by the unlawful refusal of the Deputy Collector at Tacoma to clear the ship with the lead on board. If the export of the lead had been made unlawful by subsequent act of Congress and the interference of the Collector had been lawful, then the question suggested in the English cases might arise, were it not for the lack of power in Congress to pass an act impairing the obligation of a contract previously made. But that is certainly not the question here. For it is clear that the export of the lead was perfectly lawful and that the vessel had a right to the clearance with the lead on board.

(c) It might fairly be claimed that it would have been proper and possible for the vessel to sail without clearance. Section 4197 of the Revised Statutes, provides merely that the master or person having the charge or command of any vessel bound to a foreign port shall deliver to the Collector of the District, from which such vessel is about to depart, a manifest of its cargo; and this section does not, in terms, forbid a vessel to depart without clearance, but merely provides that, if any vessel bound to a foreign port shall depart without delivering such manifest and obtaining a clearance, it shall be liable to a penalty of $500 for each and every such offense. *But the same section does make it the duty of the Collector to grant a clearance* for it says that upon the delivery of such manifest "*the collector shall grant a clearance for such vessel and her cargo.*" So that it might be argued, if necessary, that where the Collector, unlawfully and in violation of his duty as prescribed by this section, refuses to grant a clearance, the vessel would be justified in sailing without it, subject, of course, to the payment of the

fine fixed by the act, which it could then recover from the Collector.

For it is well settled that such fine, together with any damages which the charterer of the vessel may have suffered by reason of the unlawful act of the Collector would support an action by the charterer against the Deputy Collector for his unlawful act.

U. S. R. S., 989.
Hendricks vs. Gonzales, 67 F. R., 351
Schell vs. Cochran, 107 U. S., 625.
Cruikshank vs. Bidwell, 176 U. S., 73–81.
U. S. vs. Sherman, 98 U. S., 565.

(d) But, if Section 4197 of the Revised Statutes is to be regarded as, under all circumstances, prohibiting the vessel from sailing without a clearance, the Collector was expressly required to grant one, and it was the plain duty of the Receivers not to tamely acquiesce in his unlawful refusal to do so and attempt to visit the consequences upon the innocent shipper, who had no notice or knowledge of it, but to take active steps to compel the Collector to do his duty and to hold him liable for any damages resulting from his failure.

Had they done this the refusal would certainly have been promptly revoked and the vessel allowed to proceed. They might even have applied for a mandamus, which would necessarily have been granted.

If a carrier by water were to be allowed to escape from its obligations because a Collector contumaciously or unlawfully refused clearance its contracts would be worthless.

2. Nor was the performance of this contract rendered impossible by the act of the deputy collector.

The laws of the United States permit its citizens to deal in contraband of war and the exportation of lead was not in fact prohibited by the Treasury Department during the war between China and Japan. The receivers were bound to know or to ascertain what the law was upon the subject if they did not know, and indeed, they undertook to do so.

The Deputy Collector refused to clear the vessel about four o'clock in the afternoon of October 30th, and telegraphed to the Collector at Port Townsend for instructions. On the following day (October 31) he received instructions from the Collector to the effect

that there was no reason why shipment should not be permitted. The Receivers, instead of holding the vessel the short time necessary for the receipt of an answer to the Deputy Collector's telegram, in violation of their contract and of their plain duty, permitted the lead to be unloaded and the vessel to sail at 9 A. M. of the 31st, the same day upon which the instructions were received, which would have permitted the lead to go forward without trouble or delay.

As we shall argue under our next point, it was the plain duty of the Receivers, having assumed this obligation, to ascertain, in advance of the arrival of the lead at Tacoma, what the law was and to arrange for the prompt exportation of the lead there, in which case no delay whatever need have occurred; and it is clear that but for their failure to do so and but for their failure to hold the vessel for the short portion of a day (in fact less than half an hour) necessary to receive an answer to their telegram, the transportation of the lead would have been permitted and their contract could have been carried out according to its terms.

Even if the Receivers were prevented from a literal compliance with the terms of the contract they were still bound to perform it in substance.

Williams vs. Vanderbilt, 28 N. Y., 217, 223.

3. Moreover, the law is well settled that impossibility of performance arising subsequently to the making of a contract constitutes no defense.

The latest statement in this Court of the law upon this subject is contained in *Jacksonville vs. Hooper, 160 U. S., 514–527*, where the Court, after referring to certain instances of impossibility of performance existing at the time of making the contract—such as non-existence of the subject matter or legal or physical impossibility apparent on the face of the contract, says:

> " But the present case does not fall within either of these " classes, but is a case of impossibility of performance aris- " ing subsequently to the making of the contract.
>
> " Here, the general rule is that such impossibility, even " though it arises without any fault on the part of the cove- " nantor, does not discharge him from his liability under the " contract. 'The principle deducible from the authorities is " ' that if what is agreed to be done is possible and lawful, it " ' must be done.' * * * Impossible conditions cannot

" be performed; and if a person contracts to do what at the
" time is absolutely impossible, the contract will not bind
" him, because no man can be obliged to perform an impossi-
" bility. But where the contract is to do a thing which is
" possible in itself, the performance is not excused by the
" occurrence of an inevitable accident, or other contingency,
" although it was not foreseen by the party, nor within his
" control."

Hutchinson on Carriers. Sec. 317, states the rule as follows:

" If a carrier has agreed to carry the goods to their des-
" tination and deliver them within a prescribed time, he will
" be held to a strict performance of his contract, and no
" temporary obstruction, or even absolute impossibility, will
" be a defense to an action for failure to comply with the
" engagement; for when a party, by his own contract, cre-
" ates a duty which he engages to perform, he is bound to
" make it good, notwithstanding an accident or delay by
" inevitable necessity, because he might have provided
" against it by his contract."

Jones vs. U. S., 96 U. S., 24, 29.

Robson vs. Mississippi River Logging Co., 61 Fed. Rep., p. 900, affirmed, 69 Fed. Rep., 777.

The Harriman, 9 Wall., 161: In the opinion in this case, from which the Court quotes in the above case of *Jacksonville Ry. vs. Hooper*, Judge SWAYNE quotes with approval from *Paradine vs. Jane (Alleyn, 26)*, as follows:

" When the party by his own contract creates a duty or
" charge upon himself he is bound to make good if he may,
" notwithstanding any accident by inevitable necessity, be-
" cause he might have guarded against it by his contract,"

and also cites with approval *Beebe vs. Johnson, 19 Wend., 500*, where the defendant agreed to secure in England for the plaintiff the exclusive right to make, use and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine vs. Jane*, and that the covenantor was liable for the breach of his agreement.

The Court also cites with approval *Blight vs. Page, 3 Bosanquet & Puller, 295*, which is almost on all fours with the case at bar. In that case a charterer agreed to load a ship at Liebeau with barley. The ship went there to receive the cargo. The factors of the shippers informed the master that the Rus-

sian government had forbidden the exportation of barley, and that no loading could be furnished. The ship returned in ballast. The charterer was sued for the breach of the contract and held liable.

The Court also cited with approval *Barker vs. Hodgson, 3 Maule & Selwyn, 271*, where a charterer covenanted to freight a ship at Gibraltar with a homeward cargo. A pestilent disease broke out there, and all public intercourse was forbidden by law. Lord ELLENBOROUGH said:

> "If in consequence of events which happen at a foreign port the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

The Court also cited with approval the case of *Meredos vs. Hill (8 Bingham, 235)* where an owner, by a charter-party, agreed that his ship should proceed from Liverpool to Terceira, and deliver her cargo. Terceira was under blockade, and both parties knew it. There was no intention to break the blockade. The ship did not go. The owner was held liable, and the rule laid down in *Paradine vs. Jane* was cited and approved.

Ashmore & Son vs. C. S. Cox & Co., 1 Q. B. Div., [1899], page 436:

In this case the plaintiffs claimed damages for breach of contract, alleging the sale by the defendants to the plaintiffs of a quantity of Manila hemp, to be shipped from the Philippine Islands to London by sailer between May 1 and July 31, 1898. The defendants by reason of the Spanish-American war were unable to ship between the dates named, but made a declaration upon a shipment by steamer in September, which plaintiffs refused to accept upon the ground that it was not shipped in accordance with the contract. The defendants thereupon notified the plaintiffs that the declaration made by them was the only one which they could make.

The Court by Lord RUSSELL, C. J., held that the agreement that the shipment should be made by sailer between May 1 and July 31, 1898, was a condition precedent, and that the plaintiffs were not excused by the impossibility of performance. The defendants claimed that it was an implied condition of the contract that it should be possible to ship by sailer between the dates named.

Upon this question the Court held that the defendants had "taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract":

"They had taken upon themselves * * * the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition."

It has been repeatedly held, as stated in *Parsons on Contracts, Vol. 1, p. *566:*

"Where an engagement to deliver goods is absolute, a "party cannot excuse himself for non-delivery by showing "that he was prevented from carrying out his contract by "the blockade of a port, or by any other insuperable ob-"stacle."

*Addison on Contracts, *pp. 1195, 1198.*
Atkinson vs. Ritchie, 10 East., 530.
Harmony vs. Bingham, 12 N. Y., 99.
Hale vs. Rawson, 4 C. B. (N. S.), 85.
Higginson vs. Weld, 14 Gray, 165.
Splidt vs. Heath, 2 Camp., 57.
Spence vs. Chadwick, 10 A. & E. (N. S.), 517.
Hayward vs. Scangoll, 2 Camp., 56.
Story on Contracts, § 1334.

4. There seems to be no question as to the law, and the only question in a given case, we apprehend, would be whether the contract upon a fair interpretation provides for doing the thing which subsequently becomes impossible.

There is no such question in this case. This claim does not rest upon the receiver's common law liability as carriers, but upon their liability under a special contract. As we have already shown, the receivers absolutely agreed to forward this lead by steamer to sail from Tacoma October 30, and there can be no doubt, under the admitted facts in the stipulation and the correspondence of the parties, that the receivers fully understood and intended to assume this obligation and any risk which might attend it, and became subject to the rule of law above stated.

5. The Receivers, however, claim that the rule above stated does not apply where the parties at the time of making the contract cannot have had in mind the precise obstacle or contingency that subsequently prevents its fulfillment, and in support of that contention they quote a statement in the opinion in *C. M. & St. P. Ry. vs. Hoyt (149 U. S., 1).*

The Receivers' construction of that opinion clearly is not the correct one. The statement quoted was made with reference to

a contract which left the intention of the parties so much in doubt that the Court was required to determine inferentially from the circumstances surrounding the contract what that intention was. If the opinion went farther than that, or amounted to anything more than the statement of the rule to be applied in the construction of doubtful language in a contract, for the purpose of arriving at the real intention of the parties, it would be clearly opposed to the prevailing rule of law as laid down in the case in *160 U. S., 514*, and other cases before cited and recognized in the Hoyt case itself.

That such was the real scope of the language quoted from this opinion seems to be quite clear from the context as well as from the facts involved in the case.

But the language quoted, even as construed by the Receivers, is not applicable to the contract now under consideration, because here the parties originally declared their intention in the contract in such plain and unmistakable words that there can be no doubt about it, and confirmed it by subsequent declarations in their letters, and also because by their agreed statement of facts (fol. 81), the parties have agreed that Fitch "undertook to forward the lead from New York on or before September 29th and via the Northern Pacific steamer 'Tacoma' sailing from Tacoma October 30, 1894." Thus the parties have expressly determined the scope and meaning of the contract and the door has been closed against any inferential interpretation or deduction by the Court. The contract was and was clearly intended to be a guaranty of transportation to Yokohama by a particular steamer (fol. 113). And in the Hoyt case the Court said (p. 14): "There can be no doubt that a party "may by an absolute contract bind itself to perform things which "subsequently become impossible * * * and such a construction "is to be put upon an unqualified undertaking." And also (p. 11): That the rule that non-performance will be excused by the happening of an event which cannot reasonably be supposed to have been within the contemplation of the parties when the contract was made, would have no application "if the true meaning "and intent of the contract, read, as it should be, * * * in "the light of surrounding circumstances, the situation of the par- "ties and the objects they respectively had in view, was to guar- "antee" performance.

But even with the narrow construction put upon this opinion by the Receivers, it supports our claim.

For it is quite clear, as shown in our previous points, that, when the Receivers made this contract, they distinctly had in mind the possibility that the lead might be excluded from transportation as contraband in view of the war then pending, and they consciously took all that risk. They may not have contemplated the precise day when, or place where, or person by whom such interference might be caused; but they clearly understood the general danger and took the risk of it, whatever it might be and however it might arise.

And indeed it is clear that the risk which they had in mind was that of interference by the United States authorities with the sailing of the ship and not of interference with it after it sailed. Against the latter risk they were presumably protected by insurance. But the stipulation is (p. 17, Finding 8): "Before naming a rate for the transportation of the lead Fitch had expressed some doubt as to whether *it might not be excluded from transportation* as contraband"—not whether its transportation might not be interfered with after the ship had sailed. And in the petition (paragraph 7, page 3) it is alleged, and it is not denied by the answer, that thereupon the "said agent having communicated with the Treasury Department at Washington * * * ascertained that the lead would be allowed to go forward and would not be stopped as contraband."

Thus it appears conclusively that the Receivers did have in contemplation the precise interference which did occur and consciously assumed that risk.

6. The case of *N. Y. N. H. & H. R. R. vs. Baker*, 98 Fed., 694, upon which the decision of the learned Judge at Circuit is based, does not seem to us and did not seem to the Judges of the Circuit Court of Appeals, one of whom rendered that decision, to have any application to this case. That was a case of injury to a passenger while traveling on defendant's train, and the decision was rendered and the statements quoted from the opinion were made with reference to the liability of the defendant as a common carrier, under the general contract of carriage, or for negligence. The negligence, if any, was clearly not that of the defendant or its agents, and the Court properly held that the general contract of carriage did not make it an absolute insurer of the safety of its passengers and that it was not liable for an injury resulting from the carelessness of others outside its property engaged in a work

over which it had no control and for which it was in no wise responsible. If in that case there had been a special express contract, in addition to the common law liability, by which the defendant had undertaken to transport the passenger by a certain time and with absolute safety, the case might have some bearing upon this.

Unquestionably a railroad may make such a contract which will impose a liability upon it in case of failure, and that is what occurred in this case.

The attempt to apply the doctrine of that case to this entirely overlooks the fact that here the Receivers expressly, by special contract, assumed this risk, and ignores the well-settled principle that under such circumstances the carrier is liable, notwithstanding the hardship of being responsible for causes beyond its control because, as many cases say, he might have guarded against it by his contract.

VI.

The failure to fulfill the contract was due to the negligence of the Receivers.

The vital importance of prompt transportation and delivery was fully known to the Receivers before they made the contract, and the possibility that the shipment might be excluded from transportation upon the ground that it was contraband of war, had been contemplated by the Receivers, and the risk of such interference had been assumed by them. They made the contract originally with the knowledge of such risk and they reaffirmed it after they had been notified that, in the event of the threatened breach, the Trading Company would ship by steamer "City of Rio," sailing from San Francisco on October 4th, and would charge the Receivers with the difference in the rates. Thus the Receivers assumed the risk and became bound to exercise extraordinary care to insure the through transportation of the shipment in accordance with their contract, particularly as, but for their assumption of this risk, the shipment might have been

forwarded by San Francisco and have reached its destination without interruption.

Had the Receivers taken the precautions and exercised the care which they were bound to exercise in view of their contract and their assumption of this risk, the delay and consequent loss to the claimant would have been prevented. There was ample time between September 19th, when the contract was made, or even September 27th, when the lead was shipped, and October 30th, when the contract required exportation from Tacoma, for the Receivers to arrange to have the lead cleared without the officious and unlawful interference of the Deputy Collector at Tacoma on the latter date. Had they done this the Deputy Collector would have ascertained in time, as he finally did on October 31st, that there was no reason for not permitting the export of the lead, and the interference and delay would have been avoided.

When the Deputy Collector refused to clear the ship on the afternoon of October 30th, and then telegraphed to the Collector for telegraphic instructions, the Receivers should have detained the ship until those instructions were received. Instead of doing this, they permitted the lead to be unloaded and the ship to sail at 9 o'clock on October 31st. On the same day—in fact, within half an hour afterwards—the instructions were received which would have permitted the ship to sail with the lead on board. This was clearly negligence on the part of the Receivers, but for which the injury to the claimant would not have been received.

The Receivers were also clearly negligent in not promptly notifying the Trading Company of the delay in the transportation of the lead. Although they knew, or were bound to know, that the Trading Company was relying upon their absolute contract for the prompt transportation of the lead, and, of course, relying upon them to remove or overcome any obstacles that might occur in the way of such prompt transportation, they not only negligently failed to remove those obstacles themselves, but they also failed to notify the Trading Company, so as to give it an opportunity to do what it could to escape, or minimize, the damages consequent upon the delay. This was clearly negligence upon their part, for which they should be held responsible, if there were no other ground of liability whatever. They knew that the Trading Company was making other shipments of lead by the San Francisco route and had

prompt notice been given this shipment might have been sent the same way.

A delay of three days in giving notice to shippers has been held to be fatal to a carrier's claim to exemption (*"The M. M. Chase," 37 Fed. Rep., 708)*: and in this case six days elapsed before the Trading Company was informed of the delay at Tacoma (p. 22).

The damages which have been suffered by the claimant were those clearly due to the negligent omission of the carriers to exercise that degree of diligence in the interest of shippers which the law requires.

Hutchinson on Carriers, Secs. 186, 188, 208, 209.
Robinson vs. Memphis & Charlston R. R. Co., 16 Fed. Rep., 57, 69.

Even if the negligence were that of the steamship company, the Receivers, having contracted for through transportation would still be liable.

Ohio & M. R. Co. vs. McCarthy, 96 U. S., 258.
Ogdensburg and L. C. R. Co. vs. Pratt, 22 Wall, 89 U. S., 123.

VII.

The measure of damage is the difference between the contract price for the sale of the lead in Japan and the market price at the date of arrival with interest, as decided by the Court below.

"The Caledonia," 50 Fed. Rep., 567; 157 U. S., 124, 139.
Schwarzchild vs. Natl. S. S. Co., 74 Fed. Rep., 257.
Railroad vs. Estill, 147 U. S., 591, 616.
Railway Co. vs. Jurey, 111 U. S., 585.
The Nith, 36 Fed. Rep., 86; affirmed, 36 Fed. Rep., 384.
Messmore vs. N. Y. Shot & Lead Co., 40 N. Y. 422.
Booth vs. Spuyten Duyvil R. M. Co., 60 N. Y., 487-9.

VIII.

The decree of the Circuit Court of Appeals should be affirmed.

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